

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRY SUBLETT)	
Claimant)	
VS.)	
)	
SPURRIER CHEMICAL COMPANY, INC.)	Docket No. 228,370
Respondent)	
AND)	
)	
CRUM & FORSTER INSURANCE)	
Insurance Carrier)	

ORDER

Claimant appealed the November 6, 2000 Award for Post Award Medical (Award) in which Administrative Law Judge Jon L. Frobish denied claimant's request for post-award medical treatment. The Board heard oral argument on April 13, 2001, in Wichita, Kansas.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared for claimant. R. Todd King of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record consists of those transcripts identified in the November 6, 2000 Award, along with the transcript and exhibits from the November 3, 1998 settlement hearing. Additionally, at oral argument before the Board, the parties stipulated that claimant testified at a July 19, 1999 discovery deposition that he did not recall being involved in a February 1998 car accident, and also stipulated that discovery deposition transcript is not part of the record.

ISSUES

This is a post-award request for medical treatment for claimant's left shoulder. This claim was initially settled on November 3, 1998, for a 15.5 percent whole body functional

impairment, with claimant reserving the right to seek future medical benefits.¹ On June 1, 1999, claimant filed this post-award request for left shoulder treatment.

In the November 6, 2000 Award, Judge Frobish denied claimant's request for additional medical benefits. The Judge found that claimant failed to prove his present left shoulder problems resulted from his work-related accident. The Judge also concluded that claimant's attorney should have taken approximately eight hours to represent claimant at the administrative law judge level, but that conclusion would be reconsidered upon submission of an itemized statement.

Claimant contends Judge Frobish erred. Claimant argues that as early as September 1997 he had undiagnosed left shoulder tendinitis, which ultimately progressed to a shoulder impingement. Therefore, claimant requests medical treatment for the left shoulder and \$4,000 for post-award attorney fees.

Conversely, respondent and its insurance carrier contend the Award denying left shoulder medical treatment should be affirmed as claimant failed to prove the left shoulder complaints are related to the accident that he sustained while working for respondent. They also argue that claimant should not receive any attorney fees as the request for additional medical benefits had no merit.

The only issues before the Board on this appeal are:

1. Are claimant's left shoulder complaints related to the accident that he sustained while working for respondent?
2. What amount is claimant entitled to as reasonable attorney fees for the legal services rendered on his behalf in this post-award proceeding?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. The November 6, 2000 Award should be affirmed insofar as it denied claimant's request for additional medical benefits, but remanded for the Judge to address the issue of attorney fees.
2. Claimant injured both of his upper extremities while working for respondent. As part of the treatment rendered, Dr. J. Mark Melhorn performed bilateral ulnar nerve releases at the elbow and bilateral carpal tunnel decompression surgeries. Dr. Melhorn operated

¹ The accident date recited at the settlement hearing was "August 21, 1997 and each and every working day thereafter."

on the right arm on October 13, 1997, and operated on the left arm on October 27, 1997. Claimant contends the repetitive, overhead, heavy lifting that he did for respondent injured both upper extremities, including his shoulders.

3. On November 3, 1998, the parties entered into a settlement which provided that claimant would receive permanent partial general disability benefits for a 15.5 percent whole body functional impairment. The parties agreed that the settlement award would be treated as a running award, which reserved claimant's right to pursue additional medical benefits.

4. Claimant continued to work for respondent through approximately late January 1999, when he left to work for another employer as a shipping and receiving manager and traffic control manager. Claimant describes his new job as significantly easier physically than his job with respondent.

5. Although Dr. Melhorn operated on both of claimant's wrists and elbows, he also treated claimant's left shoulder with heat. In Dr. Melhorn's December 15, 1997 report, which is attached to the settlement hearing transcript, the doctor diagnosed bilateral carpal tunnel syndrome, bilateral ulnar nerve impingement and "painful right and left shoulder." The doctor rated claimant's bilateral upper extremity injuries at 14 percent to the whole body. But Dr. Melhorn did not state what part of that rating, if any, was related to claimant's shoulders.

6. The parties also introduced Dr. Jane K. Drazek's May 3, 1998 medical report at the settlement hearing. The doctor noted that claimant had undergone bilateral ulnar nerve releases and bilateral carpal tunnel releases, and also noted that claimant had a "symptom complex significant with overuse syndromes which may also include lateral epicondylitis and DeQuervain's tenosynovitis." But Dr. Drazek did not mention claimant's shoulders. The doctor rated claimant with a 17 percent whole body functional impairment.

7. The parties deposed physical medicine and rehabilitation specialist Dr. Frederick Smith, who examined and began treating claimant at respondent and its insurance carrier's request. After conducting a chart review on September 10, 1999, Dr. Smith believed claimant had tendinitis with an impingement syndrome in the shoulders, greater on the left.

8. Dr. Smith's September 10, 1999 chart review notes also record that claimant had a February 13, 1998 car accident that resulted in a final assessment of "neck strain[,] contusion shoulder, contusion forehead, abrasion of left hand." This is the car accident that claimant did not recall at his July 19, 1999 deposition.

9. Dr. Smith testified at his deposition that claimant was noting bilateral shoulder pain on September 24, 1997 pain drawings that were given to Dr. Melhorn, and that claimant also reported bilateral shoulder complaints on November 6, 1997. The doctor indicated that on Saturday, November 8, 1997, claimant sought medical treatment for his left

shoulder at Riverside Hospital, and later on both December 4, 1997, and December 15, 1997, again complained to Dr. Melhorn about shoulder pain. Despite claimant's effective cross-examination, Dr. Smith testified that he could not relate claimant's left shoulder complaints to his work for respondent. The doctor held firm to the opinions expressed in his July 11, 2000 report:

Regarding the shoulder pain causation, it appears difficult from both my examinations of Mr. Sublett [claimant] as well as reviewing the chart that there is any direct connection to his previous work duties and, in fact, his shoulder seems to have been intermittent and poorly localized. It would appear also that he has stopped doing that type of work that his shoulder pain should have resolved in the mean time [sic] but for some reason has continue[d] to persist.

Dr. Osland, evidently, has done several subacromial injections which have given good relief to Mr. Sublett. Therefore, it appears that he may have some type of bursal or tendon inflammation in the shoulder, however, again it appears unlikely that this was related in any way to his work activities at Spurrier Chemical [respondent]. In fact, it may have just as likely [been] due [to] his motor vehicle accident in February of 1998.

10. After seeing claimant approximately three times, Dr. Smith was unable to determine the cause of claimant's left shoulder complaints and, therefore, referred claimant to board certified orthopedic surgeon Dr. John D. Osland for help in determining the cause of the complaints. Commencing December 15, 1999, Dr. Osland saw, and began treating, claimant on the first of three visits. At his deposition, Dr. Osland testified that he could not relate claimant's shoulder impingement to the work that claimant performed for respondent. The doctor testified:

I feel his [claimant's] shoulder problems are probably due to an overuse tendinitis-bursitis problem. It's hard to know where it came from, but, usually with that it only is progressive.²

. . .

I feel it's more likely not to be related to his previous work.³

. . .

² Deposition of John D. Osland, M.D., September 7, 2000; p. 13.

³ Deposition of Dr. Osland; p. 17.

My opinion is that his impingement is an overuse thing, and it's more likely due to his current level of activity than something that happened four years plus ago.⁴

11. The medical evidence fails to establish that claimant's present left shoulder complaints are related to the work that he performed for respondent. Therefore, the request for additional medical benefits was properly denied.

12. The November 6, 2000 Award addresses claimant's request for post-award attorney fees. The Award reads:

The respondent argues that the claimant's counsel should not be entitled to attorney fees because the claimant in a discovery deposition denied that he had an automobile accident subsequent to his initial injury. That may be so, however, that evidence is not before the Court. In addition, neither doctor could state that the automobile accident caused nor contributed to the claimant's current condition. Furthermore, there is no indication that the claimant's counsel acted in any collusive manner to put forth a frivolous motion.

The Court finds that claimant's counsel is entitled to post award fees, however, as this is post award, a statement indicating time spent on the case should be produced so that a fee may be computed by an hourly rate. Absent a statement of the time spent on this case, the Court can only conclude that [it] should have taken approximately eight hours at \$125.00 per hour equaling a fee of \$1000.00. If a statement regarding attorney fees is submitted, the Court will issue a new order.

The above-quoted language is unclear as to whether the Judge was awarding claimant \$1,000 in attorney fees or requiring claimant's attorney to submit a statement itemizing his time. Nonetheless, as claimant's attorney announced at oral argument before the Board that he intended to submit an itemized statement to the Judge, the Board remands the attorney fees issue to the Judge for taking such evidence as the Judge deems necessary to decide the amount of attorney fees, if any, which claimant should be awarded for both this appeal and the legal services rendered at the trial level.

AWARD

WHEREFORE, the Board affirms that part of the November 6, 2000 Award that denies claimant's request for additional medical benefits and remands this claim to the Judge for consideration of claimant's request for post-award attorney fees.

⁴ Deposition of Dr. Osland, p. 55.

The Board adopts the order assessing respondent and its insurance carrier with the administrative expenses.

IT IS SO ORDERED.

Dated this ____ day of May 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority and would find that it is more probably true than not that claimant, while working for respondent, developed left shoulder tendinitis that has naturally progressed to a shoulder impingement. Therefore, I believe claimant should be allowed the additional medical benefits that he now seeks.

BOARD MEMBER

c: James B. Zongker, Wichita, KS
R. Todd King, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director